

A

Public Prosecutor v Saladin bin Yusof & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05-245-10 OF 2012
LINTON ALBERT, AZIAH ALI AND VARGHESE GEORGE JJCA
17 JUNE 2015

C

Evidence — Informer — Failure to call informer as witness — Informer played major role in events leading up to seizure of drugs by police and present when police ambushed and arrested accused — Whether prosecution's failure to call informer at trial denied accused of fair trial and opportunity to cross-examine him as eyewitness — Whether other relevant witnesses present at scene of ambush should also have been called to corroborate prosecution's case — Whether allegation of accused negotiated sale of drugs with undercover police officer doubtful as cellphone number used did not belong to accused — Whether discrepancies in testimonies of crucial prosecution witnesses affected their credibility and integrity of prosecution's case — Whether accused entitled to acquittal

E

The instant appeal was against the respondents' acquittal and discharge by the High Court on a charge of jointly trafficking in 8,349g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appeal, however, only proceeded against the second respondent ('R2'). The appeal against the first respondent ('R1') was struck out on account of the prosecution's inability to serve an arrest warrant on him to secure his attendance. According to the prosecution's evidence, a police party led by SP4 ambushed and arrested the respondents when they were beside a car (a Kancil) which contained the drugs in a parking lot near a restaurant. The police had also arrested a person named Nazri who was sitting in the restaurant at the time. The car containing the drugs had been driven there alone by R2. The prosecution contended that R1 had arrived earlier at the restaurant together with Nazri and his family. R1 then met a police officer, SP6 (who was posing undercover as a buyer for drugs) and the latter's informer, Suri, who were waiting for the seller of a pre-arranged amount of drugs to meet them and conclude the 'transaction'. Through Suri's assistance and information, SP6 had only spoken with the seller of the drugs over the cellphone but had never met him. At the meeting, R1 had apparently told SP6 that the drugs were on the way in another car and shortly after R2 arrived and R1, R2 and SP6 went to inspect the drugs, the police party sprang into action. In his testimony, R2 had said that while all of them were in the restaurant at one point, Suri had borrowed his Kancil to go somewhere for about 15 minutes and it was only after Suri returned to the restaurant that the police ambushed and arrested them. The respondents had contended at trial that: (a) they were prejudiced by the prosecution's failure to call Suri as its

F

G

H

I

witness or to have made him available to the defence; (b) the cellphone number allegedly used by SP6 to talk to the seller of the drugs did not belong to either of them; (c) major discrepancies between the testimonies of SP6 and SP4 as to the actual time and the sequence of events at the restaurant adversely affected the credibility of the prosecution's case; and (d) the failure to call Nazri as a witness left a gap in the prosecution's case. In acquitting the respondents, the trial judge held, inter alia, that: (a) Suri should have been called to testify as to his actual role in the case as it appeared his role was more than merely introducing R1 to SP6; (b) as the cellphone number did not belong to R1 there was doubt whether SP6 spoke to R1 in respect of the purchase of the drugs; (c) the failure to call Nazri as a witness left a gap in the prosecution's case as he was present at the scene and his testimony could have supported the prosecution's evidence; and (d) discrepancies in the testimonies of SP4 and SP6 as to the events that took place at the restaurant threw doubt on their credibility and the integrity of the prosecution's case.

A

B

C

D

Held, dismissing the appeal and affirming the decision of the High Court:

- (1) It could not be refuted that Suri was an active and major player in what had transpired leading up to the seizure of the drugs. He should have been called as a prosecution witness since he was not merely a person who gave particulars of R1 to SP6 confidentially. Suri was actively involved and was present at the scene during the incident; what more in the defence stage, he was implicated to have taken the Kancil out alone from where it was parked and to have brought it back later. In that respect, a valid distinction could be and had to be drawn with a situation where a so-called 'informer' remained incognito and was not party or privy to the events or facts that unfolded or formed the narrative of that evening. The failure to call or produce Suri put the defence at a disadvantage in that it deprived the defence of a fair trial and the opportunity to cross-examine this crucial eye witness (see paras 36–37).
- (2) Nazri was at the scene of the crime and was arrested but not charged. The fact that Nazri was offered to the defence in itself was not sufficient to absolve the obligation on the prosecution to have put him on the stand in the first place to firmly establish the culpability of both the respondents under the charge so as to forestall any possible defence they could make out (see para 36).
- (3) The failure to seize the cellphones from the respondents (and even from Nazri and Suri in the light of their roles in the episode) and to carry out forensic investigation to obtain particulars and details of calls made/received through the phones concerned left a major gap in one of the essential ingredients to nail the charge conclusively against the

E

F

G

H

I

- A respondents, namely, that there had, as a matter of fact, taken place negotiations between SP6 and R1 and/or R2 in respect of the drugs in question (see para 35).
- B (4) The highlighted discrepancies in the testimonies of SP4 and SP6 were relevant in so far as the question before the trial court was the credibility to be accorded to those testimonies. The trial judge did not err in considering the variance in the testimonies in the larger context of the overall circumstances surrounding the case. It affected the overall integrity of the prosecution's case which principally depended on the testimonies of those two witnesses (see para 34).
- C (5) The trial judge did not err in acquitting and discharging the respondents. On the totality of the evidence, the defence had succeeded in raising a reasonable doubt on the prosecution's case. R2's defence in this appeal was not a bare denial or one that was inherently improbable given the evidence (see paras 41–42).
- D

[Bahasa Malaysia summary]

- E Rayuan ini adalah terhadap pelepasan dan pembebasan responden-responden oleh Mahkamah Tinggi atas pertuduhan pengedaran bersama 8,349g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Walau bagaimanapun, rayuan ini hanya diteruskan terhadap responden kedua ('R2'). Rayuan terhadap responden pertama ('R1') dibatalkan atas sebab kegagalan pihak pendakwaan menyerahkan waran tangkapan terhadap R1 untuk memastikan kehadiranannya. Berdasarkan keterangan pihak pendakwaan, satu pasukan polis yang diketuai oleh SP4 telah menyerang hendap dan menangkap responden-responden semasa mereka berada di sebelah kereta (sebuah Kancil) yang membawa dadah di tempat letak kereta berdekatan sebuah restoran. Pihak polis juga menangkap seorang lagi yang bernama Nazri yang sedang duduk di restoran tersebut ketika itu. Kereta tersebut membawa dadah yang dipandu secara berseorangan oleh R2. Pihak pendakwaan mendakwa bahawa R1 tiba di restoran tersebut bersama-sama dengan Nazri dan keluarganya. R1 telah menemui seorang pegawai polis, SP6 (yang menyamar sebagai pembeli dadah) dan pemberi maklumatnya, Suri, yang menunggu pembeli tersebut berjumpa dengan mereka untuk menyempurnakan transaksi dengan jumlah dadah yang dirancang terlebih dahulu. Melalui pertolongan dan maklumat Suri, SP6 hanya bercakap dengan penjual dadah tersebut melalui telefon bimbitnya tetapi tidak berjumpa dengannya. Semasa pertemuan tersebut, R1 telah memberitahu SP6 bahawa dadah tersebut sedang dalam perjalanan dalam satu kereta lain dan sejurus selepas R2 tiba dan R1, R2 dan SP6 memeriksa dadah tersebut, pihak polis mula bertindak. Dalam keterangannya, R2 menyatakan bahawa semasa mereka berada di restoran tersebut, pada satu ketika, Suri telah meminjam kereta Kancilnya untuk pergi ke tempat lain pada lebih kurang 15 minit dan hanya selepas itu barulah Suri kembali ke restoran apabila pihak polis menyerang hendap dan menangkap mereka.
- F
- G
- H
- I

Responden-responen mengemukakan semasa perbicaraan bahawa: (a) mereka diprejudiskan dengan kegagalan pihak pendakwaan untuk memanggil Suri sebagai saksi atau untuk membuatkan dia hadir buat pihak pembelaan; (b) telefon bimbit yang didakwa digunakan oleh SP6 untuk bercakap dengan penjual dadah tersebut tidak dimiliki oleh kedua-dua mereka; (c) percanggahan besar antara keterangan-keterangan SP6 dan SP4 mengenai masa dan rentetan peristiwa yang sebenar di restoran memberi kesan buruk kepada kredibiliti kes pendakwaan; dan (d) kegagalan untuk memanggil Nazri sebagai saksi membentuk satu jurang dalam kes pendakwaan. Dalam melepaskan responden-responen, hakim bicara memutuskan, antara lain, bahawa: (a) Suri sepatutnya dipanggil sebagai saksi untuk memberi keterangan mengenai peranan sebenarnya dalam kes kerana kelihatan seperti peranannya lebih daripada sekadar memperkenalkan R1 kepada SP6; (b) nombor telefon bimbit bukan milik R1 kerana terdapat keraguan mengenai sama ada SP6 telah bercakap dengan R1 mengenai pembelian dadah; (c) kegagalan memanggil Nazri sebagai saksi meninggalkan jurang dalam kes pihak pendakwaan kerana dia hadir di tempat kejadian dan keterangannya boleh menyokong keterangan pihak pendakwaan; dan (d) percanggahan dalam keterangan SP4 dan SP6 mengenai peristiwa yang berlaku di restoran membangkitkan keraguan mengenai kredibiliti dan integriti kes pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

- (1) Tidak boleh disangkal bahawa Suri memainkan peranan besar dan aktif dalam apa yang berlaku sehingga membawa kepada rampasan dadah. Dia sepatutnya dipanggil sebagai saksi pihak pendakwaan kerana dia bukan sekadar orang yang memberi butiran kepada R1 kepada SP6 secara rahsia. Suri terlibat secara aktif dan berada di tempat kejadian semasa peristiwa itu; apatah lagi semasa peringkat pembelaan, dia dikaitkan dengan mengambil kereta Kancil tersebut seorang diri dari di mana ia diletakkan dan kemudiannya membawanya kembali semula. Dalam hal tersebut, satu perbezaan yang sah boleh dan perlu dibuat dengan satu situasi di mana apa yang dipanggil sebagai pemberi maklumat kekal tidak dikenali dan bukanlah pihak atau privi kepada peristiwa-peristiwa atau fakta yang terungkai atau terbentuk dalam naratif petang tersebut. Kegagalan untuk memanggil atau mengemukakan Suri melemahkan pihak pendakwaan dalam mana ia menafikan perbicaraan yang adil dan peluang untuk menyoal balas saksi mata yang penting ini (lihat perenggan 36–37).
- (2) Nazri berada di tempat kejadian dan telah ditangkap tetapi tidak didakwa. Fakta bahawa Nazri ditawarkan kepada pihak pembelaan dengan sendirinya tidak cukup untuk melepaskan tanggungjawab pihak pendakwaan untuk meletakkannya di kandang saksi sejak awal lagi bagi membuktikan kebersalahan kedua-dua responden di bawah pertuduhan

- A untuk mencegah apa-apa pembelaan yang boleh mereka buat (lihat perenggan 36).
- (3) Kegagalan untuk merampas telefon-telefon bimbit daripada responden-responden (malahan daripada Nazri dan Suri melihatkan pada peranan-peranan mereka dalam peristiwa tersebut) dan untuk menjalankan penyiasatan forensik bagi mendapatkan butir-butir panggilan yang dibuat melalui telefon berkenaan meninggalkan jurang yang besar dalam salah satu inti pati untuk memenuhi pertuduhan secara konklusif terhadap responden-responden, khususnya apabila, sebagai perkara fakta, berlaku rundingan-rundingan antara SP6 dan R1 dan/atau R2 berkenaan dadah tersebut (lihat perenggan 35).
- B
- C
- D (4) Percanggahan yang ditekankan dalam keterangan SP4 dan SP6 relevan setakat mana persoalan di mahkamah bicara adalah kredibiliti yang harus diberikan kepada keterangan-keterangan tersebut. Hakim bicara tidak khilaf dalam mempertimbangkan perbezaan keterangan-keterangan dalam konteks hal keadaan keseluruhan yang lebih besar melibatkan kes. Ia memberi kesan kepada keseluruhan integriti kes pendakwaan yang mana secara prinsipnya bersandarkan pada keterangan kedua-dua saksi tersebut (lihat perenggan 34).
- E
- (5) Hakim bicara tidak khilaf dalam melepaskan dan membebaskan responden-responden. Berdasarkan keseluruhan keterangan, pihak pembelaan berjaya membangkitkan keraguan munasabah atas kes pihak pendakwaan. Pembelaan R2 dalam rayuan ini bukan sekadar penafian semata-mata atau sesuatu yang tidak mungkin secara inherens, melihatkan pada keterangan (lihat perenggan 41–42).]]
- F

Notes

- G For cases on failure to call informer as witness, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2398–2401.

Cases referred to

- Abdullah Zawawi v PP* [1985] 2 MLJ 16; [1985] CLJ Rep 19, SC (refd)
- H *Asdanusi Daut & Anor v PP* [2004] 3 CLJ 669, CA (refd)
- Ghazalee bin Kassim & Ors v PP* [2009] MLJU 402; [2009] 4 CLJ 737, FC (refd)
- PP v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; [2002] 8 CLJ 814, HC (refd)
- I *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
- PP v Saimin & Ors* [1971] 2 MLJ 16 (folld)
- Wan Yurillhami bin Wan Yaacob & Anor v PP* [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 40(1)

Appeal from: Criminal Case No 45A-17 of 2010 (High Court, Alor Setar)

Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Bernard George (Tay, Bernard & Cheong) for the respondents.

Varghese George JCA:

[1] The appeal heard by us on 20 March 2014 was by the public prosecutor against the order of acquittal and discharge on 18 September 2012 of both the respondents by the High Court at Alor Setar. The charge that had been proffered against the respondents was as follows:

Bahawa kamu bersama-sama pada 22 Ogos 2010, lebih kurang jam 8.30 malam di hadapan Bank Rakyat Kulim, Jalan Kelang Lama, Kulim, di dalam Negeri Kedah Daril Aman telah didapati memperedarkan dadah berbahaya jenis Cannabis seberat 8349 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The appeal had been adjourned on three previous occasions as the prosecution had been unable to serve the arrest warrant on the first respondent ('R1'). The second respondent ('R2') was present in court before us but not R1. The learned DPP left it to the court to decide whether to only proceed with the appeal against R2 in the circumstances. Despite some reservation expressed initially, counsel for R2 subsequently agreed that the appeal be proceeded with in respect of R2 only.

Accordingly, the appeal against R1 was struck out by us.

THE PROSECUTION'S CASE

[3] The prosecution case essentially was that on 21 August 2010, based on information received that illicit drugs were being offered for sale or available for purchase in the District of Kulim, C/Insp Mohamed Sahran bin Termizi ('SP4') had instructed D/Corp Saiful Bahari bin Zi ('SP6') to act as an 'agent provocateur' and make contact with a particular drug dealer. SP6 had then met the informer who provided SP6 with the telephone contact number of one 'Pak Din'.

[4] SP6 then contacted 'Pak Din' at the telephone number given (017-4229438) and expressed his interest to obtain a supply of drugs. After

A several telephone conversations between them it was agreed that SP6 would meet Pak Din at a restaurant in Kulim at about 7pm on 22 August 2010 when Pak Din was to deliver the drugs (settled for 9 *ketul*) to SP6. SP4 was informed of this arrangement and a police party to ambush the delivery of the drugs was accordingly arranged for.

B

[5] On 22 August 2010 Pak Din had contacted SP6 again stating that he would meet the latter at about 7.20pm or thereabouts at the Restoran Dua Rasa at Jalan Kilang Lama, Kulim to 'break fast' together (as it was then the fasting month of *Ramadhan*). SP4 was informed and SP4 and his men had placed themselves around the location where the transaction was to take place.

C

[6] It was SP4 evidence that at about 8.15pm he saw SP6 together with the informer going into the restaurant. A little later SP4 saw a Kelisa car (registration No PHA 3417) entering that area. R1 was a passenger in the car. The driver was identified subsequently as Nazri, whose wife and two children were also in the car as passengers.

D

[7] R1 then met up with SP6 and the informer (who were already seated at a table in the restaurant) and according to SP6, they were told by R1 to wait for another friend to arrive. While seated at the restaurant, R1 had informed SP6 that 'barang sudah ada' and had inquired whether SP6 had brought along the agreed sum to purchase the drugs.

E

[8] SP4 then saw a Kancil car (registration No BFT 8864) approaching the parking lot driven by R2. R2 then alighted and was seen meeting with R1 and Nazri. R1 then invited SP6 to inspect the drugs which apparently were in the Kancil. R1, R2 and SP6 then proceeded to the side of the car and R1, who had taken the car keys from R2, then opened the front driver's door first and then unlocked the back door to the Kancil. R1 showed SP6 a carton box and indicated that the drugs were in there.

F

G

[9] At this point the police raiding party led by SP4 sprung into action and arrested R1 and R2 (around the Kancil) and Nazri (seated still at the restaurant).

H

SP4 conducted searches on R1, R2 and Nazri. SP4 discovered one packet wrapped in plastic from the rear right trouser pocket of R1 suspected to be ganja. No contraband item was found on the person of R2 or Nazri.

I

[10] Upon further examination of the carton box found on the rear seat of the Kancil, SP4 found it contained dried material in seven compressed packets/slabs wrapped in transparent plastic suspected to be ganja, and a

further two packets similarly compressed dried material wrapped first in aluminium foil and then in transparent plastic, suspected also to be ganja. A

[11] The items seized were marked ('S1' to 'S9') and sent for analysis. The result from the Chemistry Department was that upon analysis, the contents of the packets were found to be cannabis of net weight 8349g in total. B

[12] It was also the prosecution's case (highlighted to us during the appeal) that certain finger prints had been successfully lifted from the packets that had been recovered by SP4. There were three finger prints available in respect of packet S8 and one in respect of packet 'S9'). C

SP5 testified that one of the finger prints found on 'S8' ('S8-3') and another on 'S9' ('S9-1') matched the finger print from the 'ibu jari kanan' and 'jari telunjuk kiri' of R2, respectively. D

[13] The prosecution also adduced evidence that the Kancil from which the drugs in the carton box had been seized, had been hired or leased by R2 on 21 August 2010 (exh P3). E

[14] The learned trial judge had at the close of the prosecution case upon a maximum evaluation of the totality of evidence adduced ruled that a prima facie case had been made out against both R1 and R2 on the charge (para 21 of the *alasan penghakiman*). Both the respondents were therefore ordered to enter their defence. F

THE DEFENCE'S CASE

[15] R1's testimony given under oath was that he was at the scene of the alleged crime with a friend Nazri and his family to 'buka puasa' and they had travelled there in a Kelisa driven by Nazri. At the restaurant, they met a friend of Nazri, named Suri, who was there together with SP6. G

[16] Later R2 had arrived in another car, a Kancil but he (R1) did not know him at all. R1 denied that he had taken the Kancil's keys from R2 and was the one who showed the carton box to SP6, as stated by SP6. H

[17] R2's sworn version was that he had gone to the restaurant at the suggestion of one Suri to *berbuka puasa* and had met Nazri (together with his family) and R1 there. R2 also stated that he had not known R1 previously. SP6, whom he did not know was also there. Subsequently Suri had asked for the keys and had driven out the Kancil from where it was parked and only returned to the restaurant some 15 minutes later. It was thereafter that the police had I

A raided and arrested R1, Nazri and himself. Suri had in the meanwhile disappeared from the scene.

B [18] It was the defence case that Suri was the informer who had introduced SP6 to R1 and R2. Suri, although a material witness as to what actually transpired that evening and who was at the scene, was however not called or made available by the prosecution as a witness.

C [19] It was also contended by the defence that there were major discrepancies as between the testimony of the principal prosecution witnesses, namely, SP6 and SP4, as to the actual time of the seizure and the sequence of events as it unfolded that evening on 22 August 2010 in the vicinity of the restaurant.

D [20] Further, Nazri, who had been arrested at the same time was also not put on the stand to complete the prosecution story or to allay the contradiction or variance in the testimony as amongst the prosecution witnesses; he was merely offered to the defence.

E [21] It was also pointed out that as per ASP Ahmad Sidi bin Mohamed Lazim the investigation officer (SP8), the telephone number 017-4229438 was also found registered in the name of some other, namely, one Fadzil bin Salim. Further the 'search list' did not state that any handphone(s) had been seized from the accused or from others at the scene, much less sent for any forensic tests.

F CLOSE OF TRIAL

G [22] The learned trial judge meticulously dealt with the testimony of both the accused adduced in defence and tested it against the case that had been laid out by the prosecution. This can be seen at para 22–35 of the *alasan penghakiman*. The learned trial judge was in the event satisfied that reasonable doubt had been cast by the defence on the prosecution case and accordingly proceeded to acquit and discharge both the accused.

H [23] The rationale for the learned trial judge's conclusion as aforesaid can be distilled from the following passages from the *alasan penghakiman*, which we reproduce in its entirety here for its full effect and appreciation.

I [26] Berdasarkan keterangan yang telah di kemukakan di hadapan saya, terdapat beberapa perkara penting yang perlu saya pertimbangkan. Pertamaanya kewujudan seorang yang bernama Suri dan peranan yang beliau mainkan di dalam kes ini. Saya dapati Suri adalah seorang yang sebenarnya wujud dan berasaskan keterangan yang dikemukakan di dalam kes ini Suri adalah seorang yang memperkenalkan SP6 kepada kedua OKT. Peranan besar Suri ini diakui oleh SP4 semasa disoal balas. Pegawai penyiasat pula, ketika disoal balas oleh peguambela OKT mengaku SP6

telah membuat catatan di dalam diari siasatan beliau tentang peranan orang yang bernama Suri ini. Bagaimana pun pegawai penyiasat tidak membuat apa-apa siasatan tentang perkara ini.

[27] Keadaan ini menyebabkan saya perlu mempertimbangkan apakah peranan Suri sebenarnya, adakah sekadar sebagai sumber yang memperkenalkan OKT pertama sahaja atau lebih dari itu seperti yang dikatakan di dalam pembelaan kedua-dua OKT. *Dari keadaan kes ini saya dapati Suri telah memainkan peranan yang lebih dari peranan memperkenalkan OKT pertama kepada SP6. Suri ini sepatutnya dipanggil untuk memberi keterangan bagi menjelaskan peranan beliau.*

[28] Perkara kedua yang perlu dipertimbangkan ialah adakah keterangan yang dikemukakan membuktikan OKT pertama sebagai orang yang berhubung dengan SP6. *Di dalam hal ini saya perlu pertimbangkan nombor talipon yang dihubungi oleh SP6 untuk berbincang dengan Pak Din. Nombor talipon ini bukan didaftarkan di atas nama OKT1, sebaliknya di atas nama seorang yang mempunyai alamat di Pulau Pinang. Tiada siasatan dibuat sama sekali oleh pegawai penyiasat tentang nombor talipon ini dan rekod penggunaannya.* Berasaskan kepada peranan yang dimainkan oleh Suri yang membekalkan nombor talipon kepada SP6 dan ketiadaan siasatan oleh pegawai siasatan tentang pemilik nombor talipon tersebut, maka timbul keraguan tentang siapa sebenarnya telah bercakap dengan SP6 di dalam rundingan untuk membeli dadah berkenaan. Prinsip undang-undang jenayah adalah jelas, apabila timbul dua kemungkinan dari sesuatu keterangan atau keadaan, kemungkinan atau faedah yang bermanfaat kepada pembelaan patut diberikan. Oleh yang demikian saya dapati *terdapat keraguan tentang siapa sebenarnya yang telah dihubungi oleh SP6 dalam rundingan jual beli dadah tersebut* dan faedah dari keraguan ini ialah SP6 tidak berundingan dengan OKT pertama melalui talipon untuk membeli dadah tersebut.

[29] Ekoran dari keadaan di atas maka perkara ketiga yang perlu dipertimbangkan ialah adakah kunci kereta kancil tersebut telah dirampas dari OKT1, yang menjadi asas kes pendakwa. Saya dapati dari keseluruhan keterangan yang dikemukakan terdapat keraguan tentang dari siapakah kunci kereta tersebut dirampas. Keraguan ini juga memberi kesan terhadap keseluruhan cerita pendakwaan tentang apa sebenarnya berlaku pada hari tersebut.

[30] Selain itu saya juga perlu pertimbangkan peranan yang dimainkan Nazri di dalam kes ini dan kegagalan memanggil beliau memberi keterangan menjadikan keterangan pihak pendakwa tidak lengkap. *Dari keadaan kes ini kegagalan memanggil Nazri membawa padah ke atas kes pihak pendakwa kerana Nazri boleh memberikan cerita sebenar apa yang berlaku. Keterangan beliau mungkin boleh menyokong keterangan SP4, SP6 dan SP7 kerana Nazri berada di tempat kejadian dan ada kaitan dengan kes ini kerana beliau yang membawa OKT pertama ke tempat kejadian. Kegagalan pihak pendakwa memanggil Nazri bukanlah menjadi alasan untuk membuat inferens yang tidak memihak kepada pihak pembelaan.*

[31] Setelah meneliti semula keterangan SP4 dan SP6, saya dapati sedikit percanggahan di dalam keterangan keduanya tentang keadaan sebenar yang berlaku semasa dan selepas OKT pertama dan Nazri sampai sehingga OKT kedua sampai. Menurut SP4 selepas OKT pertama sampai OKT pertama tidak terus pergi ke meja yang sedang diduduki oleh SP6 dan sumber. SP6 juga tidak pergi berjumpa OKT

A

B

C

D

E

F

G

H

I

- A pertama. Selepas itu apabila OKT kedua sampailah barulah OKT pertama, OKT kedua dan Nazri sekeluarga bergerak ke restoran tersebut.
- B [32] SP6 sebaliknya memberi keterangan setelah OKT pertama sampai bersama Nazri, sumber memberitahu beliau Pak Din adalah penumpang yang datang bersama Nazri. SP6 kemudian pergi kepada OKT pertama bersama sumber dan mengajak OKT pertama ke Restoran untuk berbuka puasa. Bagaimanapun OKT pertama minta tunggu kawan beliau datang.
- C [33] *Percanggahan di antara dua keterangan ini nampaknya kecil apabila dipertimbangan secara berasingan dan tidak begitu ketara semasa mempertimbangkan kes pendakwaan. Bagaimanapun apabila keterangan ini dipertimbangkan bersama-sama dengan keterangan pembelaan yang mempertikaikan keterangan pihak pendakwa maka percanggahan ini memberi kesan kepada kebolehpercayaan keterangan SP6 dan SP4 tentang apa yang sebenarnya berlaku sehingga menyebabkan OKT pertama dan kedua ditangkap. Walaupun percanggahan ini kecil tetapi apabila dihubungkan dengan keterangan keseluruhan, percanggahan ini menimbulkan keraguan tentang cerita saksi-saksi pendakwaan.*
- D [34] Dengan mempertimbangkan kesemua keterangan di dalam kes ini saya dapati keterangan pembelaan telah berjaya menimbulkan keraguan yang munasabah terhadap kes pihak pendakwa. Kejayaan pembelaan menimbulkan keraguan yang munasabah terhadap kes pendakwaan telah menjadikan pihak pendakwaan gagal membuktikan kes terhadap kedua-dua OKT melampaui keraguan yang munasabah. (Emphasis added.)
- E

[24] The learned trial judge also made the observation that allegedly the gathering at the restaurant was for the purpose of ‘berbuka puasa’, but according to the principal prosecution witnesses the police raid had only taken place about 8.30pm after both the respondents had arrived there after 8pm. The court noted:

- F
- G Adalah fakta yang diketahui waktu berbuka puasa di sekitar 7.30 malam dan kejadian ini sepatutnya berlaku di sekitar waktu tersebut. Pertuduhan pula mengatakan kesalahan ini dilakukan pada jam 8.30 malam, iaitu masa yang agak lama selepas berbuka puasa. Keterangan SP6 sendiri menunjukkan beliau mengajak OKT kedua masuk ke restoran sebaik saja OKT kedua sampai juga tidak munasabah kerana ketika itu waktu berbuka puasa telah lama berlalu. Dari keterangan yang dikemukakan saya dapati kemungkinan kejadian ini berlaku lebih awal, iaitu ketika waktu berbuka puasa baru tiba dan OKT pertama, kedua dan Nazri sekeluarga pergi ke sana untuk berbuka puasa. Di dalam keadaan ini sekali lagi saya dapati keterangan SP4 dan SP6 diragui.
- H

THE APPEAL (OF R2) AND OUR CONCLUSION

- I [25] The thrust of the learned DPP’s submission before us was that the defence had not created any reasonable doubt against the case of the prosecution, such as would entitle R2 (or for that matter R1) to be acquitted and discharged of the charge as ordered by the learned trial judge. Citing the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar*

[2005] 6 MLJ 393; [2006] 1 CLJ 457, it was argued that once a prima facie case had been made out, it was not open to the court:

... to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie one that is established beyond a reasonable doubt.

[26] It was also submitted that the prosecution's failure:

- (a) to ensure that the informer, Suri, was available as a witness;
- (b) to undertake relevant further investigation upon knowing that the handphone 017-4229438 was not registered in either R1's or R2's name; and
- (c) to call Nazri to testify for the prosecution;

was not fatal to the prosecution case or otherwise sufficient for the court to hold that a reasonable doubt had been raised to the charge.

[27] It was contended that Suri did not play any 'active' part and in any event as an informer, according to the learned DPP, he was 'protected' by s 40(1) of the Dangerous Drugs Act 1952 (*Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 and *Ghazalee bin Kassim & Ors v Public Prosecutor* [2009] MLJU 402; [2009] 4 CLJ 737).

[28] It was also urged upon us that Nazri too was not a material witness and it always remained the right of the prosecution to call or not to call him as a witness although a statement might have been taken from that person (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; [1985] CLJ Rep 19). It was submitted that in this case there was no allegation of a break in the chain of evidence, and given that context, Nazri could not be considered as a material witness. Accordingly this was not a situation where an adverse presumption ought to have been invoked; Nazri had been offered as a witness in any case but the defence had chosen not to call him.

[29] It was also contended by the learned DPP that there was no material conflict in the testimony as between SP4 and SP6 and in any event the alleged discrepancies in their testimony were not, it was argued, put to the concerned witnesses by the defence when those witnesses were cross-examined.

[30] Counsel for R2 on the other hand countered that Suri was indeed an active participant or player in what had transpired that evening. It was the evidence of R2 that Suri had driven away the Kancil for some time before returning it to the car park. It was only after the Kancil was returned to the car

- A park by Suri did the police raid take place. Both SP4 and SP6 had admitted to the existence of Suri and that he was present at the scene of the alleged crime.

- B [31] It was also contended by learned counsel that as it was a fact that the phone 017-4229438 was registered in the name of some other, there was in the circumstances no credible or conclusive evidence of any 'negotiations' having taken place at all between R1 and SP6, much less with R2. There was no forensic evidence adduced as to the use (phone calls made or received) through that phone. Counsel highlighted to us the observations of Augustine Paul J (as he then was) in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; [2002] 8 CLJ 814, namely:

- D It is essential that the participants have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. The prosecution must establish that there was a pre-arranged plan to commit a criminal act and the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan (see *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; *Ong Chee Hoe & Anor v PP* [1999] 4 SLR 688). It is difficult to prove common intention by direct evidence. It is usually inferred from the facts of a particular case.

- E The law that I have discussed shows that in order to establish that the accused persons acted with common intention the prosecution must show that there is a link between them with regard to the cannabis that was recovered.

(This position of the law had been endorsed by the Court of Appeal in *Asdanusi Daut & Anor v Public Prosecutor* [2004] 3 CLJ 669).

- F [32] Counsel for R2 also submitted that the learned trial judge did not err in concluding that there were material discrepancies as between the testimony of SP4 and SP6 which went to the credibility of their evidence in court. One of the variance pointed out was that it was SP6's version of events that he and the informer (Suri) were already at the restaurant from about 7.20pm and had broken the fast together. SP4 (leading the raiding party) on the other hand stated that he had observed SP6 and the informer only arriving there at about 8.15pm.

- H [33] It need to also be pointed out here that one other matter that the learned DPP drew our attention to was the fact that certain finger print impressions matching that of R2, had been lifted from the plastic covers of two of the slabs/packages of the cannabis and this had been overlooked totally by the learned trial judge in his evaluation of the evidence before the court.

- I [34] In our assessment, although the highlighted discrepancies in the respective testimonies as between SP4 and SP6 were in regard to matters preceding and not directly pertaining to the actual event of discovery of the illicit drugs in the carton box found in the backseat of the Kancil, such variance

as to matters which, in a sense, formed the background was nevertheless relevant in so far as the question before the court was as to the credibility to be accorded to the testimonies of those witnesses. The learned trial judge had reasoned out his conclusion as pointed out above in the *alasan penghakiman* and it was obvious that His Lordship had considered the said variance in the larger context of the overall circumstances surrounding this case. We were of the view that the learned trial judge did not err here as from a wider perspective of the overall evidence for the prosecution, there certainly remained some doubt as a result of those discrepancies. This went to the overall integrity of the prosecution case which principally depended on the testimony of these two witnesses.

A

B

C

[35] Coming then to the failure to seize the handphones from the accused, (and even from Nazri and Suri in the light of their roles in the episode) and to subject them to further forensic investigation as to obtain particulars and details of calls made/received through the phones concerned, in our assessment, this did further leave a major gap in one of the essential ingredients to nail the charge conclusively against the accused, namely, that there had as a matter of fact taken place negotiations between SP6 and R1 and/or R2 in respect of the impugned transaction leading ultimately to the discovery and seizure of the drugs from the Kancil.

D

E

[36] It cannot be refuted that Suri was an active and major player in what had transpired leading up to the seizure of the drugs, as was also Nazri who was also at the scene of the crime and had been arrested but not charged. The fact that Nazri was offered to the defence in itself, in our view, was not sufficient to absolve the obligation on the prosecution to have put him on the stand in the first place to firmly establish the culpability of both the accused under the charge brought against them so as to forestall any possible defence that could be made out by the accused.

F

G

[37] As for Suri, it was our considered view that he should have been called by the prosecution as a witness since, as observed correctly by the learned trial judge, he was not merely a person who gave particulars of R1 to SP6 confidentially. Suri was actively involved and present at the scene during the incident; what more in defence, he was implicated to have taken the Kancil out alone from where it was parked and to have brought it back later. In that respects, a valid distinction could be and had to be drawn with a situation where the so called 'informer' remained incognito (unseen) and was not party or privy to the events or facts that unfolded or formed the narrative of that evening. The failure to call or produce Suri had put the defence at a disadvantage, in that the defence had been deprived of a fair trial and the opportunity to cross-examine this crucial eyewitness.

H

I

A [38] The issue in this appeal was not, as contended by the learned DPP, one of merely choosing between the credibility of the prosecution witnesses as against the testimony of R1 and R2, taken separately or even collectively, on the other part. The issue before the learned trial judge was whether a reasonable doubt had been cast on the prosecution case and whether it was ultimately safe on the material before the court to convict either or both of the accused of the charge brought against them.

C [39] It need also be highlighted here that the issue of matching finger print impressions being lifted from two of the seized packages implicating R2, was never raised or pursued in the submissions of the prosecution before the learned trial judge. The learned DPP conceded in as much before us, while also agreeing that this aspect of the prosecution case had also not been set out specifically as one of the grounds of appeal in the petition of appeal filed before this court.

E [40] We were of the view that this was a material omission and the prosecution ought to have been more careful in how all evidence available were dealt with in sufficient detail and particularity, both at trial or even at appeal stage, especially where it involved a serious offence which mandated death as a penalty.

F [41] We did not find that the learned trial judge had erred in acquitting and discharging R2 for the reasons elaborated and dealt with in the extracts from *alasan penghakiman* reproduced above.

G [42] We were in agreement with the learned trial judge that on the totality of the evidence before the court, the defence had succeeded in raising a reasonable doubt on the prosecution case. We must also add that in our view, the defence of R2 in this appeal was not a bare denial or one that was inherently improbable given the evidence that was already before the court.

H [43] We had reminded ourselves of the salutary words of Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 (albeit in a trial with jury) to the following effect:

I It is not mere doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of a case which after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable

doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[44] We were therefore not persuaded that the learned trial judge had committed any error or had misdirected himself in coming to the conclusion he did or there was any good reason which warranted our appellate interference in this case. Accordingly, we dismissed the appeal and affirmed the decision of the High Court.

Appeal dismissed and decision of High Court affirmed.

Reported by Ashok Kumar

A

B

C

D

E

F

G

H

I